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objection. The court, however, ruled the error was not prejudicial. Improper impeachment in *People v. De Witt*¹⁸ was held harmless error.

The better view is that suggested by the principal case.¹⁹ The practice of courts in reversing wherever and whenever incompetent evidence is found to have been admitted, makes the rules of evidence ends in themselves. The result is to emphasize unduly the technical and unimportant and to delay, if not defeat, justice by prolonged litigation. In determining the merits of a case upon all the competent evidence admitted, the court does not usurp the function of the jury. "Judges rule whether the whole evidence is sufficient to go to a jury and whether the verdict is against the weight of the evidence." In cases where incompetent evidence has been admitted, the problem is nothing more than to determine whether the competent evidence was sufficient to sustain the verdict.

C. S. J.

Corporations: Non-Assessable Stock: Assessments on Paid-Up Stock.—"Is an agreement between a corporation and its stockholders, embodied in its articles of incorporation and expressed in its certificate, that its capital stock shall not be assessed after it is paid in full, a valid contract as between the stockholders and the corporation?" This question was recently asked in an opinion of the California Supreme Court and answered in the affirmative.¹ This decision was rendered by the court in bank on a rehearing from the District Court of Appeal for the First District and in its decision the Supreme Court reversed the judgment rendered in the lower court.²

In this case, the corporation organized under the laws of Arizona, but doing business in California, had issued to the plaintiff shares of stock fully paid and non-assessable. Later it became indebted in a large amount and its directors levied an assessment which plaintiff refused to pay and sought an injunction against the company which was threatening to sell his stock. The Supreme Court reversed the order dissolving the injunction. For the purposes of its decision it treated this foreign corporation on the same basis as a domestic corporation.

The opinion of the lower court was based upon the proposition that the sections of the Civil Code,³ giving the directors the power to levy assessment, were enacted for the benefit of creditors, and since this agreement seemed to interfere with the rights of creditors it was

¹⁸ *People v. De Witt*, *supra*.

¹⁹ *Wigmore on Evidence*, sec. 21.

¹ *Lum v. American Wheel & Vehicle Co.*, (June 14, 1913) 45 Cal. Dec. 727.

² (July 22, 1912), 15 Cal. App. Dec. 134.

³ Civil Code (Cal.) secs. 331, 332 et seq.

held void and unenforceable. The authority cited in support of this rule,⁴ as pointed out by the upper court, was based upon a set of circumstances in which the assessment was levied for unpaid subscriptions when the company was insolvent. Creditors certainly have a right to unpaid subscriptions, and, when the corporation is insolvent, the "trust fund theory" gives them greater rights than when the company is a going concern. Even when the concern has not been declared insolvent, the directors have a right to collect unpaid subscriptions by an assessment, for the purpose of paying its debts.⁵ The subscription fund is at the basis of the state's grant of corporate privileges, and consequently all subscription agreements are primarily for the benefit of creditors. It has been suggested that creditors should have a right to collect them directly.⁶

Can the creditors claim the same benefits in other money available by the directors? The power to assess is given by the statute and not by common law and may be exercised for the purpose of paying debts and maintaining the company after subscriptions have been fully paid up.⁷ The creditor is primarily interested in having his debts paid rather than having the company continue as a going concern. The latter is the interest of the stockholder. In considering the nature of assessments the interests of both creditor and stockholder should be kept in mind. When we follow the decision of the court and come to the conclusion that the agreement in this case is a valid one even though there are some debts to be paid, we are maintaining that the question of assessments on paid up stock is a matter of policy in order to keep the company going rather than a question of getting in money to pay debts. Is that unfair to the creditor? Apparently not in this state where we have stockholders' liability and hold that the stockholder is primarily and not secondarily liable.⁸ The creditor still has two remedies, to take what the corporation has on hand, and to recover on the stockholders' liability.

Although it seems fair to allow the creditor to have a direct interest in unpaid subscriptions even when they are to be collected by assessments, the same reasons do not apply where the directors merely have the power to get in money by assessments. The trust fund theory does not seem broad enough to cover the latter case. The

⁴ *Union Savings Bank v. Leiter* (1905) 145 Cal. 696.

⁵ Civil Code (Cal.) sec. 332; *Santa Cruz Ry. Co. v. Spreckels*, (1884) 65 Cal. 193.

⁶ *Turner v. Fidelity Loan Co.*, (1905) 2 Cal. App. 126; *Vermont Marble Co. v. Declez Co.* (1902) 135 Cal. 579.

⁷ *Santa Cruz Ry. Co. v. Spreckels*, (1884) 65 Cal. 193; *Green v. Abiente Med. Co.*, (1892) 96 Cal. 322.

⁸ Constitution of California, Art. 12, sec. 3; Civil Code (Cal.) sec. 322; *Mokelumne Mine Co. v. Woodbury*, (1859) 14 Cal. 265; *Young v. Rosenbaum*, (1870) 39 Cal. 646; *Sonoma Valley Bank v. Hill*, (1881) 59 Cal. 107; *Knowles v. Sandercock*, (1895) 107 Cal. 629.

agreement for non-assessable stock does not interfere with an equitable right of the creditor but with a mere statutory right given to directors which may result in a convenience to the creditor.

M. C. L.

Corporations: Stock Issued for Property: Overvaluation.—The problem concerning the rights of a creditor to recover the difference between the par value of stock and the amount actually paid for it has been much discussed by the authorities. The question is a much more intricate one when the stock has been issued for property, instead of money. A recent decision¹ on this point announces the rule in California that where stock has been issued for property, the value of which is less than the par value of the stock, the creditor has a right to recover from the shareholders, the difference between the value of the property and the par value of the stock.

The rule that the creditor has a right to recover the difference between the amount actually paid for the stock in money and the par value of the stock has heretofore been definitely decided in this state.² What is the test to be used in computing the value of the property in the principal case? "It is the value of the property in the condition it is in at the time of the exchange, the value as known to the parties and as they honestly believe it to be, that determines the liability, at least where there is no subsequent increase in value nor any intentional fraud." This is the test that is applied by the Court in determining the question here. In this case the directors knew the value of the property but issued the stock in good faith believing that the property would increase in value to the amount of the par value of the stock. The good faith in the transaction was controlled by the actual value known at the time of the exchange. This decision does not cover the situation where the parties at the time of the exchange honestly mistake the value of the property, and so overvalue it. By way of dictum the court suggests that in that situation in the absence of actual fraud, the creditor cannot recover from the stockholder. It remains to be determined, therefore, whether in this state in a case of overvaluation of property made in good faith and under an honest mistake of judgment by the parties, the creditor can recover anything from the stockholders. It is submitted that this will depend upon the question whether the right of the creditor to have the full par value of the stock paid into the treasury of the corporation is absolute or whether he must impeach the purchase of the stock on the ground of fraud. As between stockholders in such a situation, the rule is that a stockholder must impeach such a purchase on the ground of fraud.³

¹ Herron Co. v. Shaw, (June 14, 1913) 45 Cal. Dec. 734, 133 Pac. 488.

² Vermont Marble Co. v. Declez Co., (1902) 135 Cal. 579, 67 Pac. 1057.

³ Garretson v. Pacific Coast Co., (1905) 146 Cal. 185, 79 Pac. 838.